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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1328

J. EDWIN LA VALLEE, Superintendent Clinton Correctional Facility, Dannemora, New York,

Petitioner,

against

ROBERT STEVEN MOSHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the order of the Southern District of New York granting a petition for a writ of habeas corpus.

Citation to the Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at —— F 2d —— (Appendix A).

The opinion of the United States District Court for the Southern District of New York, Bryan, J., is reported at 351 F. Supp. 1101 (Appendix B).

Jurisdiction

The judgment dated January 8, 1974 was entered January , 1974.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

1. Is the State bound by a false representation by a retained attorney to a defendant that the judge has made a sentence promise when such representation was made without the knowledge of any representative of the State?

2. Do the facts, as they existed at the time of plea and sentence, support the conclusion that the defendant objectively believed that there was a sentence promise?

(a) Does a planned escape prior to sentence indicate that the defendant had no objective belief that there was a sentence promise of a minimum sentence?

(b) Does a statement by the defendant that there was no sentence promise indicate that he had no objective belief that there was a sentence promise?

3. If a defendant has been advised by his attorney of a purported sentence promise by the Court which in fact was not made and if he falsely denies on the record at the time of the entry of the plea his reliance on the sentence promise thus communicated, thereby depriving the agents of the State of any opportunity to correct his mistaken but secret understanding, may the defendant nevertheless rely upon the false promise from his attorney in collateral proceedings despite his own wrongful and fraudulent conduct?

Facts

Having received prior information that a robbery would be attempted at the post office on the grounds of the Maryknoll Seminary, Ossining, New York on March 9, 1964, police officers from the New York State Police, New York City, Ossining and the Westchester County Sheriff's Office surrounded the building. The respondent and his cohorts entered the post office, confronted the postmistress, who was in fact a Deputy Sheriff attired in a nun's habit, and stole approximately 40,000 dollars worth of valuables. Upon leaving the building, the men were told by the police to surrender and, after an exchange of gunfire, the defendant, Edward Reid and Richard Bracken were taken into custody. As the respondent and his companions were caught "red-handed" (68a), a conviction was a virtual certainty (91a, 130a).

By Indictment No. 226-64 the Grand Jury of Westchester County charged the three with the crimes of Robbery in the First Degree (while armed and aided by the use of an automobile), Assault in the Second Degree, Grand Larceny in the First Degree and Feloniously Carrying Concealed Loaded Firearms. On April 15, 1964, each defendant, represented by retained counsel, appeared before Honorable John H. Galloway and entered a plea of not guilty. On June 17, 1964, as trial was about to begin, each appeared before Honorable Robert J. Trainor, requested permission to withdraw his previously entered plea of not guilty and enter a plea of guilty to the crime of Robbery in the First Degree as charged in the first count of the indictment in full satisfaction of all the charges contained therein. After having been assured by each defendant that the plea was voluntarily made and that there had been no promises as to sentence, Judge Trainor accepted the plea. On July 9, 1964, the respondent was sentenced as a second felony of-

fender, to a term of 40-60 years and on July 22, 1964, Bracken and Reid respectively were sentenced to Elmira Reformatory and to ten to twenty years.[1]

By petition dated February 18, 1971, the respondent sought a writ of habeas corpus, alleging that his plea of guilty was involuntary because he "believed the statement made by his attorney that the sentencing judge had in fact promised that he would not think in terms of maximums when sentencing and that (he) entered his plea relying upon that belief." (12a). A hearing on the respondent's contentions was ordered on November 4, 1971 and on December 15, 1971 that hearing commenced. After the hearing and in a decision dated December 7, 1972 Honorable Frederick vP. Bryan found that the respondent plead guilty based upon the untrue representations made to him by his attorney that the Judge had promised him a sentence of 15-16 years if he plead guilty (203a). By order dated January 8, 1973, the writ of habeas corpus was sustained and the petitioner discharged unless within sixty days he was permitted to withdraw his plea or his sentence was reduced to 15-16 years (213a). The order was stayed pending determination by the Court of Appeals which, on January 8, 1974, affirmed.

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[1] The defendant's conviction and sentence was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department (29 AD 2d 549, 286 NYS 2d 791) and leave to appeal to the Court of Appeals was denied on March 27, 1968.

A coram nobis petition was denied by the County Court without a hearing on December 16, 1968. A motion for reargument was denied on June 2, 1969. The denial of the application was affirmed by the Appellate Division (33 AD 2d 906, 307 NYS 2d 846) and leave to appeal to the Court of Appeals was denied on April 17, 1970.

POINT I

There was no objective basis for a belief by the respondent that he would be given a minimum sentence.

The Court of Appeals, while holding that a *subjective* mistaken belief that there is a sentence promise will not invalidate a plea of guilty, found that there were in this case, circumstances which, judged by *objective* standards, reasonably justified his mistaken impression that there was a sentence promise. The respondent's statements and conduct at the time of plea and sentence affirmatively prove that he did not objectively believe that there was a sentence promise and that that belief was developed and nurtured only as the instant habeas corpus proceeding progressed.

(a) The Respondent Affirmatively Stated There Was No Sentence Promise.

At the time the respondent entered a plea of guilty, he was asked if any promises had been made to him by anyone and in response answered, "No." (74a, 102a). Of course, if this answer was not true and the Judge or prosecutor was aware of that fact, the State would be a party to the fraud and could not rely on the statement of the respondent. In a case such as this, however, where neither the Judge nor prosecutor was aware of any belief by the defendant that there was a sentence promise, what could they do but believe the defendant's solemn word?

The defendant's attorney testified that, in his experience, when a specific sentence promise has been made, that fact is placed on the record (104a). There is thus no support for the respondent's conclusion, "well, I think everybody understands that you're instructed to say no" (57a). In any event, if the respondent believed that there had been a sentence promise when he stated that there had been no promise and that statement was not corrected by the judge, prosecutor or his attorney, he was aware not

only that his answer was dishonest, but also that no one else believed there had been a promise or, if they did, they did not intend to admit or be bound by it.

If the respondent had believed that there had been a sentence promise and had so advised the Court when asked, the Court could have corrected his mistaken impression and given him an opportunity to decide whether he still wished to plead guilty knowing there was no sentence promise. However, when the respondent answered that there was no promise, which it is submitted is the fact, he consciously waived any right to claim the benefit of any promise he believed to exist.

(b) Before Sentence, The Respondent Plotted To Escape From The Jail Even Though He Had Supposedly Been Promised The Minimum Sentence In Return For A Plea Of Guilty.

While the respondent was incarcerated awaiting sentence, the Sheriff uncovered a plot by him to smuggle weapons into the County Jail so that he might escape. The plot also included a plan to kill the District Attorney, the Bronx Lieutenant who took part in the investigation and the informer.[2] This was not only another example of the respondent's violent anti-social behavior, but also a strong indication that the respondent did not enter a guilty plea based upon an alleged promise of a minimum sentence. If the respondent had believed that he was going to receive a minimum sentence and that was the reason for the entry of a plea of guilty, certainly, at a time before the pronouncement of sentence, he would not have contemplated escape, an avenue which would, almost certainly, result in increased incarceration. If, however, as it is submitted is the case, the respondent knew that he faced any sentence

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[2] As was known to the Judge at the time of sentence, the informer, who was later killed, had been found shot two days prior thereto in the Bronx.

up to the maximum permitted by law and being aware that, no matter what the sentence imposed (including any additional term for escape), he would be eligible for parole in twenty years (1945 Penal Law) an attempted escape would be a reasonable alternative.

(c) The Respondent's Record Did Not Merit A Consideration of Leniency.

The respondent was no novice to Court proceedings and while he probably hoped that a lighter sentence would be imposed on his plea of guilty, there is no way that he could reasonably have believed that a minimum sentence would be imposed. In fact, in his petition for a writ of habeas corpus the only statement that the respondent claimed to have relied on was one that may have precluded a maximum but which in no way indicated any consideration of a minimum (12a). The respondent's prior criminal record, the nature of the instant crime, and his actions after the plea of guilty are such that *no one* could possibly believe that *any* judge might even consider showing *any* compassion.

The respondent was charged with Robbery in the First Degree for a crime committed on January 16, 1953 in the Bronx during which the victim was severely injured by the respondent's companion. Probably because his only prior conflict with the law resulted in a Youthful Offender Adjudication some three months earlier, the respondent was permitted to plead guilty to the lesser crime of Robbery in the Third Degree. Even at that time the respondent's behavior did not merit consideration on sentence and he was sentenced to 5-10 years, 10 years being the maximum term permitted by law.

On February 24, 1964, less than two weeks before the commission of the instant crime, the respondent committed an armed robbery in the Bronx. On June 19, 1964 he plead guilty as charged to Robbery in the First Degree and at the time

of sentence in Westchester County, was awaiting sentence on that conviction.[3]

Even if one were not convinced by the respondent's prior violent anti-social behavior that he should receive no consideration, an examination of the facts of the instant crime involving, as it did, the armed robbery of a nun at a seminary post office would dispel any doubt.

Not only could the respondent not reasonably believe that a minimum sentence would be considered, he could not even hope that such would be the case. That this is true is shown by the respondent's background, his statement that no promise as to sentence had been made and his subsequent plan to escape prior to sentence.

POINT II

The respondent's fraudulent conduct deprives him of any claim to relief where in fact there was no sentence promise.

Assuming, for the sake of argument only, that the respondent did operate under a mistaken belief that there had been a sentence promise made by the Judge, he nevertheless sought to secure the advantage of leniency by false and fraudulent conduct. He falsely denied his reliance upon a promise knowing that the denial was being made a matter of public record. He accordingly must have believed that there was something improper about the supposed leniency arrangements; nevertheless, he chose to lie in order to secure an improper and wrongful benefit.

In such cases where there has been in fact a sentence promise by the Judge the false denial of the sentence promise at the time of entry of the plea does not bar col-

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[3] While the respondent and his attorney testified that he was given a concurrent 15-16 year sentence in the Bronx, that sentence, as a matter of law, had to be consecutive (2190[1], Penal Law; *People* v. *Ingber*, 248 NY 302 [1928]).

lateral attack upon the conviction thus obtained nor prevent a repudiation of the denial by the respondent in the collateral proceedings (See: *United States ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308 [1963]; *Hilliard* v. *Beto,* 465 F. 2d 829 [1972]).[4] However, those cases do not necessarily stand for the proposition that a respondent's denial of reliance on a sentence promise *never* operates as a bar to collateral attack. In cases where there were in fact sentence promises and the Court or prosecutor *knew* at the time of the denial, that it was fraudulent, and participated in the fraud by his acquiescence in the misrepresentation thus placed upon the public record, the wrongdoing of State agents, in that context, outweighed the respondent's otherwise self-defeating fraud (indeed, this is not always the case, however, for in a comparable situation, this Court has held the integrity of the judicial system and the obligation of the defendant to proceed truthfully if he is to have its full benefits outweighs the usual judicial antipathy to official wrong-doing. Compare: *Harris* v. *New York,* 401 US 222 [1971]). However, where there is no official wrongdoing and where the agents of the State are wholly innocent with respect to the fraud that the defendant perpetrates, the situation should be viewed in a completely different way. For example, if the defendant believed wrongly that the Judge was willing to give him a lenient sentence in return for a bribe and undertook to pay the bribe through his attorney, or another private intermediary, while the latter knowing the true state of affairs kept the money for himself, and the defendant was thereafter sentenced upon his plea of guilty to a harsh sentence it is unthinkable that any court would grant the defendant collateral relief because he took his plea upon a mistaken belief that the judge was corrupt and had unsuccessfully sought to take wrongful advantage of the situation. The case of the respondent at bar is different

[4] Compare: United States ex rel. *Scott* v. *Mancusi,* 429 F. 2d 104, cert. den. 402 US 909.

only in the degree of his culpability, not in the fact of his culpability. His act was both wrongful and, of necessity, predicated upon a belief that the arrangement he thought he had was wrongful. He has no claim in equity or in justice to relief.

If he were to be entitled to relief, despite his fraud and the innocence of the State, the State would be helpless to protect itself from such machinations and the resulting collateral vacation of countless convictions. The inestimable principle of finality of judgment would be sacrificed, not to the necessity of justice and constitutional order, but rather to the success of culpability and fraud. However, if the respondent here is not entitled to relief, no unjust rule shall reign. In cases where the Judge has made, but failed to keep, a sentence promise, the false denial of the promise by the defendant will not automatically bar him from relief. Where an honest defendant honestly, but mistakenly, believes that there is a sentence promise, his honest statement at the time of the plea to that effect will permit the Judge to correct his mistake before he acts in reliance on it.

Nor can the involvement of the respondent's attorney give him a stronger constitutional claim. If he believed, as he must have, because of its purported secretive nature, that the supposed sentence arrangement was wrongful, then, from his subjective viewpoint, his relationship to his attorney ceased to be that of client and became, instead, accomplice. Could the defendant described above in the bribery situation have complained if the intermediary was his attorney? Would Viven Harris have been successful in preventing the use of his inadmissible statement to impeach his perjury merely because his attorney had been a party to it? When the defendant undertook to participate with his attorney in wrongful conduct for those purposes he waived the relationship.

Justice here not only permits but requires a holding against the respondent on this issue.

POINT III

A plea is not involutary because predicated upon a plea promise by retained counsel.

A plea based upon an unfulfilled promise or false representation is involuntary only if the promise or representation was made, or acquiesced in, by a representative of the state (*Brady* v. *United States,* 397 US 742 [1970]), be he a police officer (*Von Moltke* v. *Gillies,* 332 US 708 [1948]; *Waley* v. *Johnson,* 316 US 101 [1942]), prosecutor (*Santobello* v. *New York,* 414 US 257 [1971]; *Walker* v. *Johnston,* 312 US 275 [1964]), Judge or counsel assigned by the state.

> ". . . post-conviction relief is available to a defendant only where it is action of the part of the State, through court, prosecutor or other law enforcement officer, which brought about a denial of effective assistance of counsel or an interference with the defendant's right to such assistance."
>
> *People* v. *Tomaselli,* 7 NY 2d 350, 165 NE 2d 551 (1960).

A plea is not however involuntary when predicated upon an unfulfilled promise of a person who is not an agent of the State and when such promise is neither known to nor acquiesced in by the State (*United States ex rel. Curtis* v. *Zelker,* 466 F. 2d 1092 [1972], cert. den. 410 US 945; *United States ex rel. La Fay* v. *Fritz,* 455 F. 2d 297 [1972], cert. den. 407 US 923; *People* v. *Cowen,* 68 Misc. 2d 660, 328 NYS 2d 111 [1971]; *United States ex rel. Scott* v. *Mancusi,* 429 F. 2d 104, cert. den. 402 US 909). If this were not true, a dissatisfied defendant would be able to claim that his plea was involuntary because he was coerced by his mother (See: *United States ex rel. Curtis* v. *Zelker, supra*), a fellow convict or even by his own subjective delusions. The law is rational. The State must and will protect the rights of a defendant. It cannot and will not,

however, tell a defendant from whom he should seek advice nor will it tell him what he should think or believe.

In any event, there can be no question that Morahan was only relaying to the respondent his estimate of what he believed the sentence would be.

> ". . . I told him . . . it was not my opinion that he would receive (the) maximum" (93a).
>
> "I told him I felt he would receive a minimum sentence" (166a)

Counsel of course intended to try to convince the Judge to give the defendant a minimum sentence. Bracken heard him tell Mosher, ". . . he would get him a minimum of 15-16 years," (122a) and he tried to see the Judge prior to sentence to persuade him to impose a minimum term.

> "I usually make it a practice in a case, especially in a case like this one, to discuss before sentence what the Court may intend to do, and to try to use my powers of persuasion to get bottom time . . ."
> "The first thing I would have discussed would be the sentence, and I would have implored him to give this man bottom time . . ." (100a)

Clearly an erroneous sentence estimate by an attorney is not a proper basis for a finding that a plea was involuntary (*United States ex rel. Scott* v. *Mancusi, supra; United States ex rel. La Fay* v. *Fritz, supra*).

POINT IV

The respondent's plea was voluntarily entered upon the advice of competent counsel and was based upon rational reasons.

There is no doubt that the respondent and his cohorts are guilty and there would appear to be little doubt that had they gone to trial they would have been convicted and sentenced to maximum terms (53a, 91a, 71a, 130a). While in

many cases a trial presents a reasonable chance of a favorable disposition, to secure any sort of "break" in the instant case, a trial was out of the question.

A defendant must be properly advised so that he can make an intelligent choice whether to plead guilty or go to trial. The respondent testified that he discussed with his attorney a possible defense of entrapment (68a) and that his attorney advised him that it was not then a defense in New York (69a). The respondent, believing that it would take twenty years to get to the Supreme Court on a test case, abandoned the defense (69-70a). Mr. Morahan, believing that the respondent would be convicted after trial (95a) and that if he plead guilty would, in all likelihood, receive a minimal term (93a), counseled the respondent to accept the only plea offered, that of Robbery in the First Degree (94-95a).

There was no question that unless all three defendants entered a plea of guilty to Robbery in the First Degree as charged in the first count of the indictment, the District Attorney would not recommend acceptance of any plea by any defendant to less than the indictment as charged and that in the absence of such recommendation no plea could be accepted by the Court. Thus the situation of each defendant and the possible consequences to him must be considered not alone in relation to him but in relation also to his co-defendants.

> "Q. Did your co-defendants pressure you in any way to take this plea? A. Well, when you're in a situation like that, my co-defendants are my co-defendants. I figure the other guy is getting five, he's getting ten, I'm getting the bulk of the weight anyway." (56a)

The minimum term of the sentence imposed is the most important consideration to a defendant as that determines the earliest parole eligibility date. The date for the respondent would be calculated either on the basis of fifteen

years (the lowest permissible sentence) or twenty years (the highest minimum for parole consideration). On a fifteen year sentence a defendant would be eligible for parole in ten years and on a twenty year sentence in thirteen years, four months. Whether Reid was given a minimum or maximum indeterminate sentence would be completely immaterial as in either event he would be eligible for parole in six years, eight months. The only person who had a lot to gain was Bracken. On a minimum sentence he could be released at any time and release was mandatory at the end of five years, but on a maximum sentence he would not be eligible for parole for six years, eight months and could be imprisoned for thirty years.

Acknowledging the inevitable consequences of trial, one in the position of the respondent and his cohorts must consider the possibility of a benefit to one by the entry of a plea of guilty by all. While each would hope that he would receive a lesser sentence, the probability that one of the three would, makes the entry of a plea of guilty the more favorable alternative (Compare: *Brady* v. *United States, supra*).

"All for one, one for all."

Alexandre Dumas: *The Three Musketeers,* IX.

The respondent was aware of his almost certain conviction after trial and believed that upon conviction he and his co-defendants would be sentenced to maximum terms of imprisonment. He was thus aware of the alternatives and in a position to make an intelligent choice, whether or not he subjectively believed he would receive a minimum sentence after plea, whether to face the certainty of a maximum sentence or take the chance of a lesser one.

That he knowingly and intelligently decided a plea of guilty was in his best interest is well illustrated by the fact that he said no promises were made to him. If there were none, as it is submitted is the fact, there is no problem. If there were, by saying no and not attempting to enhance

his position, the respondent acknowledged the fact that the plea was in his best interest, whether or not accompanied by a sentence promise.

POINT V

There is no credible evidence that the respondent's attorney told him that a sentence promise had been made.

The Courts below found that the respondent entered a plea of guilty based upon the representation of his attorney that the Judge "had promised to give him a minimum sentence of 15-16 years if he pleaded guilty." It is respectfully submitted that this conclusion is not supported by the record.

> "Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own determination of the record. (*Norris* v. *Alabama,* 294 US 587, 79 L.Ed. 1074, 55 S. Ct. 579).
>
> *Spano* v. *New York,* 360 US 315, 316 [1959].

The testimony by Reid is a mere parroting of that by Mosher and can be of no independent value. This conclusion becomes obvious when one considers the facts that: Mosher and Reid are incarcerated together at Clinton Correctional Facility (48a, 75a, 80a); both testified that Morahan spoke to all three defendants as spokesman (53a, 77a) while the attorneys and Bracken testified that each attorney spoke to his own client in a different portion of the room (38a, 92a, 128a); in describing the statement supposedly made by the Judge both testified it was that he "would not bury them" (53a, 54a, 78a, 80a, 81a), a statement not used by any of the other witnesses.

Mr. Morahan testified that it was his opinion that the respondent would not receive the maximum, that in his conversation with Mosher he relayed his impression that in all likelihood he would get a bottom of fifteen years to possibly twenty years (93a), that he felt Mosher would re-

ceive a minimum sentence and that he told Mosher that the Judge stated that he did not think in terms of maximums (106a). The furthest Mr. Morahan would go in saying that he told the respondent that there was a "promise" was that he "probably" used that word in relaying the supposed statement by the Judge that he does not think in terms of maximums (116a).

As Mr. Parker was talking to his own client, Bracken, while Morahan was talking to Mosher, all he remembered having heard was "minimum and not maximum" (38a). He further testified that Morahan indicated to him that the Judge had "indicated" that if a plea was taken, "the Judge would consider . . . a minimum sentence and not a maximum sentence" (37a).

That Bracken was more than slightly confused as to what took place is apparent from his testimony. He testified "we were supposed to get fifteen years instead of fifty" (124a) when in fact as a first offender, his sentence to a state prison could only be between ten and thirty years (2125, Penal Law) and "we were promise(d) that we would get a minimum sentence, not a maximum, as a first offender going to trial" (126a). In recounting what he heard Mr. Morahan tell Mosher, Bracken testified that he said "if all took a plea he would get him a minimum of fifteen to sixteen years" (122a), not that there had been a promise of that term, and simply, with no further explanation, "fifteen to sixteen years" (132a).

Turning now to the testimony of the respondent Mosher, the only testimony which could support the finding that Mr. Morahan told Mosher that the Judge had promised to give him a minimum sentence of fifteen to sixteen years, it will be seen that even he gave no credible testimony which would support the finding of fact. The respondent testified that Morahan told him that the Judge said that if they went to trial they would get a maximum sentence (53a, 71a) and that "he said that (Richie) was going to go to Elmira Reformatory that was five years; Eddie

would receive ten years, double that; I was to receive two times that" (54a). In fact, the only times the respondent mentions a term of fifteen to sixteen years is when he refers to what he "figured" he would receive (55a, 56a, 57a).

POINT VI

Justice is Justice.

The bottom term of the sentence imposed, in this case either the mandatory minimum of 15 years or, the 40 years actually imposed, is the important term as it is the one which determines the parole eligibility date (93-94a). Subsequent to the imposition of sentence, Section 212a(3) of the Correction Law[5] was added (May 22, 1972) making the respondent eligible for parole *on the exact same day* under either sentence.

The only portion of the sentence which is still important is the maximum, be it sixteen or sixty years. That is of course the maximum release date and while the respondent could be incarcerated until then, the importance of such, in practical effect, is that it determines the maximum period of parole supervision. That the respondent, at the time of plea was only concerned with the period of incarceration that he faced is obvious; that the Judge was concerned with the future prospects of the respondent and the necessity of lifetime parole supervision is apparent.

The respondent is now eligible for parole by operation of statute. He has in practical fact been given the minimum term he claims was promised. To reduce the maximum term or force the State to try a ten year old case would be a travesty of justice.

> "Justice, though due to the accused, is due to the accuser also."
>
> *Snyder* v. *Massachusetts,* 291 US 97, 122.

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[5] 212a(3) Correction Law: "Any person who is not otherwise or who will not sooner become eligible for release on parole shall be or become eligible for release on parole under such sentence after service of a minimum period of imprisonment of eight years and four months.

Conclusion

The cases have held that a sentence promise made to a defendant, *of which the State is aware,* which is later abrogated, may operate as an undue inducement to the defendant to plead guilty. On the facts in the instant case, the State had no remedy to cure the defect, or abrogation of the promise, being unaware of any such inducement made to this defendant. The cases of this Court should not control a fact situation as inapposite as the instant one. To make such a misapplication of this Court's rulings may well emasculate the State's criminal justice processes, and effectively prohibit the State from ever accepting a guilty plea, even where, as here, a defendant denies being induced to so plead on the voir dire.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion.

BRYAN, DISTRICT JUDGE:

Robert S. Mosher, now petitioning this Court for a writ of habeas corpus, is presently serving a 40 to 60-year sentence of imprisonment imposed by the County Court of Westchester County, New York, on July 9, 1964.[1] Mosher was sentenced as a second felony offender on a plea of guilty to a count of armed robbery in the first degree.

Mosher urges that his plea of guilty was involuntary and both plea and sentence must be set aside. He makes two alternative contentions.

Mosher's first claim is that the County Court Judge, prior to accepting his guilty plea, promised that, if he pled guilty, he would receive a minimum sentence; he was induced by this promise to plead guilty instead of standing trial; but, that the promise was broken when the judge gave him what was tantamount to a maximum sentence.

Alternatively, Mosher claims that even if the judge did not make such a promise, his attorney assured him that the judge had promised to give him a minimum sentence if he pled guilty and that he was induced to plead guilty by such assurance, which turned out to be untrue.

Mosher's conviction and sentence were affirmed, People v. Mosher, 29 A.D.2d 549, 286 N.Y.S.2d 791 (2d Dep't, 1967), and leave to appeal to the New York Court of Appeals was denied on March 27, 1968. On July 25, 1968, Mosher brought a coram nobis proceeding in the County Court of Westchester County which raised substantially the same issues as are presented here. The County Court denied the petition without a hearing. The Appellate Divi-

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[1] Mosher's incarceration has not been uneventful. *See* United States ex rel. Mosher v. Lavallee, 321 F. Supp. 127 (N.D.N.Y. 1970), *affirmed in part and reversed in part*, 460 F.2d 126 (2d Cir. 1972).

sion affirmed and the Court of Appeals again denied leave to appeal.

Mosher then brought the instant proceeding. In substance, the same papers were submitted on this application as had been presented to the Westchester County Court on his coram nobis application. Since there were issues of fact raised by these papers, I held an evidentiary hearing.[2] At the hearing, James T. Morahan, Esq., the attorney retained by Mosher's family to represent him in the case in which he pled guilty, Mosher himself, his co-defendants Bracken and Reid, Philip Parker, Esq., Bracken's attorney, and Hon. Robert J. Trainor, Justice of the New York Supreme Court, formerly Westchester County Court Judge, all testified.

The evidence before me was as follows:

Mosher and his co-defendants, Bracken and Reid, were arrested in March, 1964, for the armed robbery of the United States Post Office at Mary Knoll Seminary in Ossining, New York. Not unnaturally, the case received wide publicity.

Mosher and his co-defendants were indicted on four counts, charging (1) robbery in the first degree, (2) grand larceny, (3) second degree assault, and (4) felonious carrying of concealed, loaded firearms. All defendants initially pleaded not guilty to all counts.

On June 17, 1964, Mosher apeared before Judge Trainor and stated through counsel he wished to plead guilty to armed robbery in the first degree. Judge Trainor, in open court, asked Mosher whether any threats or promises had been made to induce him to change his plea and Mosher answered in the negative. Judge Trainor accepted the plea.

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[2] Machibroda v. United States, 368 U.S. 487 (1962); Townsend v. Sain, 372 U.S. 293 (1963); Walker v. Johnston, 312 U.S. 275 (1941); United States ex rel. McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963).

His co-defendants Bracken and Reid also pled guilty to that count.

On July 9, 1964 Mosher appeared before Judge Trainor for sentence. He had previously served five years of a 10-year term on a prior conviction of armed robbery and was thus a second felony offender. Under the New York law in effect in 1964, the maximum sentence which Mosher could have received as a second felony offender on his guilty plea to armed robbery in the first degree was 60 years. Former N.Y. Penal Law §§ 2125, 1941.[3] The minimum sentence which could have been imposed was 15 years. *Id.* Judge Trainor sentenced Mosher to not less than 40 nor more than 60 years, as a second felony offender. A few days after Judge Trainor sentenced Mosher, he sentenced Mosher's co-defendant Reid to 10 to 20 years, and his co-defendant Bracken to a reformatory term not to exceed 5 years.

On the morning of the day on which Mosher and his co-defendants changed their pleas, Morahan, Mosher's attorney, the Assistant District Attorney in charge of the case,

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[3] The State suggests that a sentence of substantially more than 60 years could have been imposed on Mosher on his plea of guilty to armed robbery because he used a gun and a car in the commission of the crime. See Former N.Y. Penal L. §§ 1905, 1944. It is urged, therefore, that Mosher did not receive a maximum sentence and has no complaint.

This suggestion is plainly an afterthought and must be disregarded. It is unnecessary to consider whether or not the sentencing Court had the power to give such additional sentences on a plea to armed robbery for there is no evidence that such a possibility, if it existed at all, was ever considered by anyone involved in the case, including the judge, the prosecutor, Mosher and Morahan, or that such a possibility was a factor in Mosher's decision to plead guilty. Moreover, assuming arguendo that some additional time could have been imposed, the sentence actually imposed was plainly in practical effect a maximum sentence, both in terms of when Mosher would be eligible for parole, *see* N. Y. Correction L. § 212 (McKinney 1968), *as superseded by* § 212-a (McKinney Supp. 1972); former N.Y. Penal L. § 1945(2); and his life expectancy when he was sentenced.

the District Attorney and the attorney for the co-defendant Reid, met with Judge Trainor in his chambers. Subsequent to that meeting, Morahan and the attorneys for the other two defendants met with their clients in the detention area of the Westchester County Courthouse to discuss the plea. Mosher's contentions that his plea was involuntary are based on what occurred in these two meetings. The evidence as to what occurred must be discussed in some detail.

(1)

The meeting in Judge Trainor's chambers took place some eight years ago and the testimony as to precisely what was said is, not unnaturally, by no means clear.

According to Morahan, he continued his prior attempts to bargain with the prosecutor for a lesser plea than robbery in the first degree but was wholly unsuccessful. The prosecutor was willing to accept only a plea to the armed robbery count to cover all four counts of the indictment and nothing less. How much Judge Trainor participated in that discussion is not clear. However, Morahan testified that during the course of the meeting, Judge Trainor made a remark to the effect that "I don't think in maximums" and at the conclusion told the two defense attorneys to discuss with their clients the plea offer.

Judge Trainor, on the other hand, testified that it had been his consistent practice not to give any assurances to counsel with respect to possible sentence and that he had never done so. He recalled the Mosher case and specifically denied that he had made any promise or commitment to Morahan with respect to Mosher's sentence, or authorized anyone to do so.[4] He also flatly denied saying to Morahan

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[4] It may be noted that there is no claim here that the prosecutor made any commitment of any kind with respect to the Mosher sentence.

that he would not think in terms of maximums or using any language to that effect.

None of the other persons present at the meeting in chambers were called to testify by either side, apparently because none of them had any recollection of what had occurred there eight years before.

After analyzing the testimony at the hearing and evaluating the credibility of the witnesses, I find that no promise of any kind as to Mosher's sentence was made by Judge Trainor to Mosher's attorney or to anyone else prior to the change of plea or at any other time.

I further find that nothing was said at the meeting in chambers or elsewhere which could reasonably be construed as a commitment not to impose a maximum sentence, to impose a lenient sentence or, even less, to impose a minimum sentence. Thus the "impression" which Morahan said he received at the meeting in chambers that any such promise or commitment had been made was wholly unjustified and without foundation.

On his first contention, Mosher had the burden of showing that a promise as to sentence was made by the Judge. *E.g.*, United States ex rel. Carter v. LaVallee, 441 F.2d 620 (2d Cir. 1971). He wholly failed to sustain that burden here. Thus, the cases holding that a guilty plea induced by a broken promise as to sentence by the judge or prosecutor, is subject to being set aside as involuntary, Santobello v. New York, 404 U.S. 257 (1971); Smith v. United States, 321 F. 2d 954 (9th Cir. 1963); United States ex rel. McGrath v. LaVallee, 319 F. 2d 308 (2d Cir. 1963); United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244 (S.D.N.Y. 1966), do not apply.

There is no merit to Mosher's first contention and he is not entitled to relief on that ground.

(2)

When Morahan left Judge Trainor's chambers, he encountered Parker, Bracken's attorney, who had not been present at the meeting. Parker, whose client, Bracken, was only 23 and a first offender, said that, about a week before, he had talked to Judge Trainor and the prosecutor about a possible reformatory sentence for Bracken if he pled guilty. According to Parker, the Judge had said he would take all the facts under advisement and consider a favorable disposition.

Parker testified that Morahan discussed with him what had happened in chambers and the offer to accept a plea by all three defendants to the armed robbery count. According to Parker, Morahan said that the Judge had "indicated" that if such a plea were taken he would "consider" a minimum sentence and not a maximum sentence. There appears to have been no basis, other than wishful thinking, on which Morahan could have reached the conclusion that the Judge would even consider a minimum sentence for Mosher.

Morahan, Parker, and Graham Schneider, Esq. (the attorney representing Reid) then met with their three clients in the detention area of the Courthouse. What took place there and, particularly, what took place between Morahan and Mosher, is the crux of this proceeding.

In the discussions between Mosher and Morahan as to the advisability of taking the armed robbery plea, the alternatives Morahan presented to Mosher were that he would receive the maximum of 59 to 60 years, if he were convicted after trial, or the minimum (15 to 16 years) as a second felony offender, if he pleaded guilty. It was recognized that since the defendants had been caught "red handed", the State had a very strong case, and that if Mosher went to trial a conviction was very likely.

Morahan posed the alternatives to Mosher in terms of maximums and minimums only and there appears to have been no reference to any sentence in between. Mosher believed that these were the alternatives and made his choice to plead guilty on that basis.

Morahan however wrongly believed, from his meeting with Judge Trainor, that these were the alternatives also and that the Judge had promised to impose a minimum if there was a guilty plea. He gave Mosher assurances that this was the situation and that such a promise had been made. He thus led Mosher to believe that he would receive a minimum sentence of 15-16 years if he took the offered plea but would get 59-60 years if he were convicted, as he probably would be.

Morahan also told Mosher that on another indictment for armed robbery, pending in Bronx County, he would also receive a 15 to 16 year sentence, to run concurrently with the similar minimum which would be imposed by Judge Trainor. Mosher did in fact receive a 15 to 16 year concurrent sentence on his subsequent plea of guilty to the Bronx County indictment.

Despite Morahan's uncertainty after all these years as to the precise language he used in his discussions with Mosher, and the somewhat loose phraseology he indulged in during his testimony, taking the testimony as a whole, the conclusion is inescapable that as a result of Morahan's assurances Mosher was led to believe that Judge Trainor had promised to give him the minimum of 15-16 years on a guilty plea and that Mosher made his decision to plead guilty because of that firm belief. Instead, Mosher received a 40 to 60 year sentence which was for all practical purposes tantamount to a maximum.[5]

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[5] See note 3, *supra*.

The testimony of the other witnesses at the hearing lends credence and support to the conclusion that Mosher was induced to plead guilty because he understood and believed he was to receive a minimum sentence.

Parker, co-defendant Bracken's attorney, told his client, on the basis of his conversation with Morahan, that if he pleaded guilty, the sentence would be "minimum, not maximum". Parker proceeded on the assumption that a penitentiary sentence for his client had been precluded by Judge Trainor and that Bracken would receive a 0 to 5 year reformatory sentence only. This was what Bracken got.

Bracken, who had successfully completed parole after two years at the reformatory and had not been in further trouble with the law, testified that he heard Morahan tell Mosher that there was a deal for a minimum of 15 to 16 years, that Mosher said this was a good deal and that he would take it. The other co-defendant, Reid, who got 10-20 years, testified that Mosher told him he decided to take the plea because he feared a sentence of 60 years after trial and instead was getting a break.

When Mosher pled guilty before Judge Trainor, he was specifically asked by the Court whether any promises or threats had been made to induce him to plead guilty. Mosher gave a negative answer. His attorney said nothing.

While this must be taken into account in evaluating Mosher's contention, it is not of controlling weight or significance. Hilliard v. Beto, 465 F.2d 829 (5th Cir. 1972); United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 314 (2d Cir. 1963); United States v. Tateo, 214 F.Supp. 560, 564 (S.D.N.Y. 1963). Mosher, who had had considerable previous experience with the processes of the criminal law, evidently understood that this was the standard answer to be given to that question, even though a plea bargain had been made. This, of course, is common where

there have been plea negotiations and could be expected. See United States ex rel. Scott v. Mancusi, 429 F.2d 104, 113 n. 1 (1970) (dissenting opinion), *cert. denied,* 402 U.S. 909 (1971).

Mosher's response to the Court's questions when the plea was taken cannot, under the circumstances, be said to overcome the strong evidence that he was told by Morahan and in fact believed that a promise of a minimum sentence had been made by the Judge and was induced to change his plea because he understood that there was such a promise.

On the basis of all of the evidence before me, I find that:

1. Mosher was induced to plead guilty by representations and assurances given him by his counsel, Morahan, which Mosher believed, that Judge Trainor had promised to give him a minimum sentence of 15-16 years if he were convicted after trial as was likely.

2. No such promise had in fact been made by Judge Trainor and the representations and assurances given to Mosher by Morahan that such a promise had been made by the Judge were contrary to the fact and untrue.

3. The sentence of 40-60 years received by Mosher on his guilty plea was directly contrary to the assurances given by Morahan to Mosher as to the Judge's promise as to the sentence which would be imposed.

For the reasons stated in Brady v. United States, 397 U.S. 742, 748 (1970), it is well settled that a guilty plea must be voluntarily and knowingly made and that a conviction based on an involuntary plea of guilty is inconsistent with due process and must be set aside on collateral attack by federal habeas corpus. Santobello v. New York, 404 U.S. 257 (1971); North Carolina v. Alford, 400 U.S. 25

(1970); Machibroda v. United States, 368 U.S. 487 (1962); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Waley v. Johnston, 316 U.S. 101 (1942).

In cases such as this where a defendant pleaded guilty in the belief that he would receive a minimum sentence and in fact received a maximum, the question of whether or not the plea was voluntarily and knowingly made is by no means simple. If a defendant pleads guilty in the belief that a minimum sentence will be imposed, induced by a promise or commitment by the judge or prosecutor to that effect, and that promise is broken, the plea is involuntary. *E.g.*, Santobello v. New York, 404 U.S. 257 (1971).

On the other hand, where, though no such promise has been made, the defendant pleads guilty in the belief that he will receive a light sentence but in fact receives a heavy one, the result may be different. If the defendant's belief that he will receive leniency is induced by an erroneous sentence estimate made by defense counsel, his plea is not involuntary and will not be set aside. *See* United States ex rel. Bullock v. Warden, 408 F.2d 1326, 1330 (2d Cir. 1969), *cert. denied*, 396 U.S. 1043 (1970); United States ex rel. Scott v. Mancusi, 429 F.2d 104, 108 (1970), *cert. denied*, 402 U.S. 909 (1971). Moreover, a plea is not involuntary merely because the defendant pleads guilty under the subjective mistaken impression or belief that a promise has been made by the judge that a lenient sentence would be given when instead the sentence was a heavy one. United Stats ex rel. LaFay v. Fritz, 455 F.2d 297 (2d Cir.), *cert. denied*, 407 U.S. 923 (1972); *United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092 (2d Cir. 1972).

As the Court of Appeals said in United States ex rel. Curtis v. Zelker,

> It must be recognized that while a guilty plea, to be valid, must be voluntary and represent an intelligent choice among alternative courses of action available

> to the defendant [citations omitted], a defendant's mistaken subjective impressions gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea. 466 F.2d at 1098.

The Court went on to say:

> To justify the issuance of a federal writ vacating his guilty plea, the petitioner must bear the burden of showing, that the circumstances as they existed at the time of the plea, judged by objective standards, reasonably justified his mistaken impression. *Id.*

However, none of the cases in this Circuit dealing with this subject have passed on the effect on the validity of a guilty plea of a false statement by defense counsel to defendant that a promise as to sentence had been made by the judge.

In United States ex rel. LaFay v. Fritz, *supra,* the district court had refused to find that defendant's counsel had made a promise as to what the sentence would be or that counsel had stated that such a promise had been made by the judge. The Court of Appeals held that a guilty plea should not be set aside merely because defendant had the mistaken subjective belief that a promise of leniency had been made. As Judge Feinberg pointed out in his concurring opinion, the most that was established was that "defendant's lawyer had a 'feeling' as to what the sentence would be, which he passed on to defendant." 455 F.2d at 303. Judge Feinberg went on to say, "Whether the result would be different if defendant's counsel—court appointed or retained—had mistakenly quoted the judge as to a sentence of no more than five years is not before us." *Id.*

In United States ex rel. Scott v. Mancusi, *supra*, the majority reversed as clearly erroneous findings of the District Court that defendant's counsel had made misrepresentations to him concerning commitments by the trial judge as to sentence, on which defendant relied in pleading guilty, stating, "[T]he representations made by counsel to Scott were couched in the language of hope rather than promise and were merely estimates made in good faith as to what he thought would result. . . ." 429 F.2d at 108. It was held that this was insufficient to render the guilty plea involuntary. The judgment below, granting defendant's petition for a writ was reversed and the petition dismissed. The dissent took the position that the findings of the District Court should not have been reversed and that on the basis of such findings the guilty plea should be set aside because it was induced by misrepresentations of counsel as to commitments made by the judge concerning the sentence which would be imposed.

In United States ex rel. Callahan v. Follette, 418 F.2d 903 (2d Cir. 1969), *cert. denied*, 400 U.S. 840 (1970), the evidence indicated that while no representations as to sentence had been made by the Court, the guilty plea was induced by representations of defense counsel that counsel had an understanding with the Court that defendant would receive only a suspended or concurrent sentence. The Court stated:

> The question whether or not a plea must be held voluntary unless the state, that is, the judge or prosecutor, induced the plea by affirmative promises or statements as to sentence was reserved in United States v. Horton, 334 F.2d 153 (2d Cir. 1964).

The Court did not reach that question, however, since it held that defendant had waived any objection to his plea by his subsequent failure to take the opportunity offered by the judge to move for withdrawal of the plea. The

denial of the writ by the District Court was affirmed solely on that ground.

In United States v. Horton, 334 F.2d 153 (2d Cir. 1964), the statements of counsel and the prosecutor's recommendations as to sentence were expressions of opinion only. In refusing to set aside the guilty plea, the Court of Appeals found it unnecessary to pass on whether affirmative misrepresentations of defense counsel as to commitments made concerning sentence, which induced a guilty plea, would render the plea involuntary.

Other circuits have held that a guilty plea is involuntary and subject to being set aside if induced by false representations of defense counsel as to a promise of a lenient sentence by the trial judge or prosecutor, which was not fulfilled. For example, in United States v. Simpson, 436 F.2d 162 (D.C. Cir. 1970), it was held that false representations by defense counsel as to an agreement with the judge concerning sentence would constitute impermissible verbal coercion which made the plea involuntary and would also support a claim of ineffective assistance of counsel. To the same general effect, see Ross v. Wainright, 451 F.2d 298 (5th Cir. 1971), *cert. denied,* 41 U.S.L.W. 3187 (U.S. Oct. 10, 1972) (No. 71-1065); Petraborg v. United States, 432 F.2d 1194 (7th Cir. 1970); United States v. Schneer, 194 F.2d 598, 600 (3d Cir. 1952) (dictum). *See also* 8 *Moore's Federal Practice,* ¶ 11.05[4] at 11-104 to 105 (2d ed. 1972), where it is said that a "[p]lea induced by defense counsel's false or mistaken representations to defendant as to what, if anything, the prosecutor promised . . . should be vacated, regardless of the prosecutor's lack of complicity in the fraud or mistake."

However, as has been demonstrated, the question presented here remains open in this Circuit. It is a difficult one.

The question must be viewed in the context of the standard set by Judge Friendly in United States ex rel. Curtis

v. Zelker, *supra*, that the petitioner has the burden of showing that "the circumstances as they existed at the time of the plea, judged by objective standards, reasonably justify his mistaken impression." 466 F.2d at 1098.

As Judge Weinfeld said in United States v. Colson, 230 F.Supp. 953, 955 (S.D.N.Y. 1964):

> The determination of the ultimate question of whether the defendant, at the time he plead guilty, had the free will essential to a reasoned choice, rests upon probabilities and, of course, cannot be resolved with mathematical certainty. It involves an evaluation of psychological and other factors that may reasonably be calculated to influence the human mind. . . . [I]t is necessary to consider the plea of guilty against the totality of events and circumstances which preceded its entry.

Applying these standards to the case at bar, and considering Mosher's guilty plea "against the totality of events and circumstances which preceded its entry", Mosher has met the burden of showing that the circumstances "judged by objective standards" reasonably justified his mistaken belief that Judge Trainor had promised him what was tantamount to a minimum sentence and had indicated he would receive a maximum if he were convicted after trial. He got the maximum instead of the minimum.

What induced Mosher to plead guilty was not merely an erroneous estimate or expression of opinion by defense counsel as to sentence. Nor was it a subjective mistaken impression (or, indeed, wishful thinking), induced by the discussions with his counsel, which was not reasonably justified. Morahan told Mosher that Judge Trainor had promised a minimum if he plead guilty, in so many words, and the tenor of the entire discussion was such as to make Mosher believe that this promise had been made.

This was supported by the testimony of all the witnesses who were present at the discussions in the detention area. It is also supported by such circumstances as the minimum sentence of 15-16 years on the Bronx County indictment actually imposed on Mosher to run concurrently with the Westchester County sentence which appears to have been negotiated by Morahan on the basis that it was the same as the sentence Mosher was to get from Judge Trainor; the utter shock and surprise of both Morahan and Mosher when the 40-60 year sentence was announced; the prompt commencement of state proceedings based on the claim of the Judge's broken promise.

From Mosher's standpoint, the effect of the false statements by counsel was no different than it would have been had the Judge actually made the alleged promise and broken it. He was entirely in the hands of his attorney, who was also an officer of the Court, and he was fully entitled to believe that the misrepresentations made to him by Morahan were true.

As Chief Judge Friendly does, I recognize and am concerned about the dangers in any proposition "which would afford an all too easy avenue for the invalidating of convictions on pleas of guilty" United States v. Horton, *supra*, 334 F.2d at 154, or would "provide every prisoner with an opportunity to start out with a guilty plea, with the assurance that if he should later be disappointed at the treatment accorded him he could withdraw his plea and demand a trial on the ground that at the time of his guilty plea he had labored under an erroneous impression as to what would hapen to him after acceptance of the plea." United States ex rel. Curtis v. Zelker, *supra*, 466 F.2d at 1098.

However, if the standards of objective proof required by United States ex rel. Curtis v. Zelker are adhered to, these dangers are, at the least, very substantially reduced.

Where, as here, the proof meets these objective standards, whatever dangers there may be are not sufficient to permit the Court to countenance a clear deprivation of important Constitutional rights or to fail to grant appropriate relief for such deprivation. I hold that Mosher's plea was involuntary and thus violative of his constitutional rights.

Beyond this, there is a further question here—whether the conduct of Morahan in making the egregious misrepresentation that the Judge had promised a minimum sentence, with the disastrous consequences to Mosher which followed, resulted in depriving Mosher of his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments. "This is not a case where hindsight reveals tactical or strategic errors 'over which conscientious attorneys might differ'." United States ex rel. Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967). Nor does the case involve advice of a legal nature in an area where lawyers might well have differing views. *Cf.* McMann v. Richardson, 397 U.S. 759, 769-771 (1970).

Here there was a flat false representation by Morahan that there was a promise of a minimum sentence by the Judge, though there was none. There was no justification for the false statement made. The false statement resulted in Mosher's being deprived of basic constitutional rights. A defendant is deprived of the effective assistance of counsel if his counsel's conduct was "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950); United States v. Horton, 334 F.2d 153 (2d Cir. 1964); United States ex rel. Boucher v. Reincke, 341 F.2d 977, 982 (2d Cir. 1965); United States ex rel. Maselli v. Reincke, supra; United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972). Conduct is of such a kind "[i]f counsel's representation is so 'horribly inept' as to amount to 'a breach of his legal duty faithfully to represent his

client's interests'." United States ex rel. Maselli v. Reincke, supra, 383 F.2d at 132, quoting from Kennedy v. United States, 259 F.2d 883, 886 (5th Cir. 1958), cert. denied, 359 U.S. 994 (1959). In addition, the results must have been so prejudicial to defendant as to have deprived him of substantial rights. United States ex rel. Maselli v. Reincke, *supra,* 383 F.2d at 132. When these two elements are present there is a fundamental lack of fairness essential to due process and defendant has been denied the effective assistance of counsel to which he is entitled under the Sixth and Fourteenth Amendments.

Here there is a direct cause and effect relationship between the false statements of counsel and Mosher's loss of important constitutional rights. The prejudice to Mosher is undeniable. It is difficult to see how false representations by counsel, however motivated, could have had more disastrous consequences for the client. Thus, not only was Mosher's plea involuntary but, under the circumstances, he was denied the effective assistance of counsel in pleading guilty and the judgment of conviction should not be allowed to stand on this ground also. United States v. Simpson, 436 F.2d 162 (D.C. Cir. 1970).

(3)

There remains a question as to the remedy to be afforded to the petitioner in a case such as this.

Santobello v. New York, 404 U.S. 257 (1971) held that a breach of agreement by the prosecutor that he would make no recommendation as to sentence required that a judgment of conviction on a guilty plea be vacated. In that case, the Supreme Court remanded the case to the state courts for further consideration of whether there should be specific performance of the agreement which had been broken or whether the petitioner should be permitted to withdraw his guilty plea and stand trial.

This case is different from *Santobello* since there there was a breach of an official promise for which the state was held responsible and here there is no promise of that nature. The remedy fashioned in *Santobello* was based, in part at least, on the theory that the circumstances might require specific performance of the plea agreement instead of the relief of withdrawal of plea sought by the petitioner. Despite the differences, however, *Santobello* suggests a form of remedy here which would be both just and simple. It is now some eight years since the events for which Mosher was indicted took place. It may well be that if Mosher's plea were vacated, the state would find it difficult, if not impossible, to try the case at this late date, due to lack of witnesses or other eventualities. On the other hand, Mosher's only complaint here is that, whereas he believed he had a commitment for a sentence of 15-16 years, in fact he had no such commitment. If Mosher had received a sentence of 15-16 years, he would have had no complaint.

Under those circumstances it appears that a fair and just solution would be to permit the state courts to determine whether Mosher should be permitted to withdraw his plea of guilty to armed robbery and stand trial for the crimes with which he was charged, or to reduce his sentence to 15-16 years, which was what he expected.[*]

The order to be entered will so provide.

This opinion constitutes my findings of fact and conclusions of law in this case.

SETTLE ORDER ON 10 DAYS' NOTICE.

FREDERICK P. BRYAN,
United States District Judge.

Dated: New York, New York, December 7, 1972.

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[*] In view of my decision on Mosher's claims addressed to his guilty plea, it is unnecessary to reach Mosher's additional claim based on alleged disclosure of his presentence report to the prosecutor and to the Appellate Division. I do not pass on that claim.

Order Appealed From.

A writ of habeas corpus in the above-styled proceeding, having come on to be heard before the court, and after hearing Michael Meltsner, attorney for the petitioner, in support of the writ, and Robert S. Hammer, Assistant Attorney General of the State of New York (for the Honorable Louis J. Lefkowitz, Attorney General), attorney for respondent, in opposition thereto, and upon the petition for the writ, the return thereto, and all papers, proceedings and testimony heretofore had herein, and the court having rendered an opinion dated December 7, 1972, it is hereby

ORDERED, that the writ of habeas corpus herein be, and the same hereby is, sustained and petitioner discharged from custody unless within 60 days from the date of entry of this Order either (a) petitioner is permitted to withdraw his plea of guilty to count one of Westchester County indictment No. 3177-1964 and to stand trial on the charges in said indictment, or (b) petitioner's sentence on his plea of guilty to count one of said indictment is reduced to a term of 15-16 years.

ORDERED, that this order is stayed pending appeal and determination of this case by the Court of Appeals for the Second Circuit, provided that respondent perfects an appeal and files his brief in the Court of Appeals within eighty days of the date of this order.

s/ FREDERICK P. BRYAN,
United States District Judge.

Dated: January 8, 1973, New York, New York.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 58—September Term, 1973.

(Argued November 5, 1973 Decided January 8, 1974.)

Docket No. 73-1354

ROBERT STEVEN MOSHER,

Petitioner-Appellee,

v.

J. EDWIN LAVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York,

Respondent-Appellant.

Before:

FRIENDLY, WATERMAN and TIMBERS,

Circuit Judges.

Appeal from an order entered in the Southern District of New York, Frederick vP. Bryan, *District Judge,* 351 F.Supp. 1101, granting a state prisoner's petition for a writ of habeas corpus after an evidentiary hearing and ordering that prisoner be discharged unless within 60 days either (a) prisoner is permitted to withdraw his guilty plea and to stand trial on the indictment, or (b) prisoner's 40 to 60 year sentence is reduced to a 15 to 16 year sentence.

Affirmed.

Opinion.

ROBERT S. HAMMER, Asst. Atty. Gen. of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Atty. Gen., and Samuel A. Hirshowitz, First Asst. Atty. Gen., New York, N.Y., on the brief), *for Respondent-Appellant.*

MICHAEL MELTSNER, New York, N.Y., *for Petitioner-Appellee.*

CARL A. VERGARI, Dist. Atty. of Westchester County, JANET CUNARD, Senior Asst. Dist. Atty., and JON WILLCOX, Asst. Dist. Atty., White Plains, N.Y., *for Amicus Curiae.*

PER CURIAM:

On this appeal from an order entered in the Southern District of New York, Frederick vP. Bryan, *District Judge,* granting a state prisoner's petition for a writ of habeas corpus after an evidentiary hearing, the essential issue is the correctness of the district court's conclusion that the prisoner's guilty plea must be vacated because it was involuntarily entered or because the prisoner was denied the effective assistance of counsel. We hold that the district court's findings of fact are not clearly erroneous and that its conclusions of law reflect a correct application of the controlling law, and therefore, we affirm.

In view of the district court's detailed statement of both the facts and the controlling law, it is sufficient for our purpose merely to state the claims asserted and the district court's rulings thereon, with which we agree.

Mosher and two co-defendants were indicted in the Westchester County Court for the March 1964 armed robbery of the United States Post Office at Maryknoll Semi-

nary, Ossining, New York. After first pleading not guilty to the four count indictment, Mosher on June 17, 1964, before Hon. Robert J. Trainor, changed his plea to one of guilty to the count charging armed robbery in the first degree. On July 9, 1964, Judge Trainor sentenced Mosher as a second felony offender to not less than 40 nor more than 60 years.

After exhausting state remedies with respect to his conviction and sentence,[1] Mosher commenced the instant habeas corpus proceeding in the district court. His claims that his guilty plea was involuntarily entered and that he was denied the effective assistance of counsel, turn upon the events of the morning of June 17, 1964 just prior to the entry of his plea of guilty. The district court, finding that issues of fact were raised by the papers submitted on the habeas corpus application, held an evidentiary hearing. At this hearing there was testimony by Justice (formerly Judge) Trainor, Mosher, his two co-defendants, the attorney for one of the co-defendants, and James T. Morahan, Esq., the retained attorney for Mosher at the time of his guilty plea in the County Court.

The critical findings made by the district court after the evidentiary hearing are as follows:

"1. Mosher was induced to plead guilty by representations and assurances given him by his counsel,

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[1] Mosher's conviction and sentence were affirmed on direct appeal. *People* v. *Mosher*, 29 App. Div. 2d 549, 286 N.Y.S. 2d 721 (2nd Dept. 1967) (mem.). Leave to appeal to the New York Court of Appeals was denied on March 27, 1968.

Coram nobis petitions, raising substantially the same issues as in the instant habeas corpus proceeding, were denied without a hearing by the Westchester County Court on December 16, 1968. The Appellate Division affirmed. *People* v. *Mosher*, 33 App. Div. 2d 906, 307 N.Y.S. 2d 846 (2nd Dept. 1970) (mem.). Leave to appeal to the New York Court of Appeals was denied on April 17, 1970.

Morahan, which Mosher believed, that Judge Trainor had promised to give him a minimum sentence of 15-16 years if he [pleaded guilty].[2]

2. No such promise had in fact been made by Judge Trainor and the representations and assurances given to Mosher by Morahan that such a promise had been made by the Judge were contrary to the fact and untrue.

3. The sentence of 40-60 years received by Mosher on his guilty plea was directly contrary to the assurances given by Morahan to Mosher as to the Judge's promise as to the sentence which would be imposed." 351 F.Supp. at 1107.

On the basis of these findings, which we hold were not clearly erroneous, the district court concluded that Mosher's guilty plea must be vacated because it was involuntarily entered and also because Mosher was denied the effective assistance of counsel. We agree.

The State correctly notes that this is not a case like those where a guilty plea has been held involuntary because induced by an unfulfilled promise of a lenient sentence made by a judge or prosecutor. See, e.g., *Santobello* v. *New York*, 404 U.S. 257 (1971). On the other hand, this is likewise not a case where a defendant's belief that he will receive leniency is induced by an erroneous estimate *made by defense counsel*, see *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 108 (2 Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); *United States ex rel. Bullock* v. *Warden*, 408 F.2d 1326, 1330 (2 Cir. 1969), *cert. denied*, 396 U.S. 1043

[2] The portion in brackets conforms to the district court's findings, 351 F.Supp. at 1106, and corrects the erroneous statement under paragraph "1.", 351 F.Supp. at 1107.

(1970), nor is this a case where a defendant pleads guilty under the *subjective* mistaken impression or belief that a promise has been made by a judge of a lenient sentence and instead a heavy sentence is imposed, see *United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092, 1098 (2 Cir. 1972); *United States ex rel. LaFay* v. *Fritz*, 455 F.2d 297, 302-03 (2 Cir.), *cert. denied*, 407 U.S. 93 (1972); in neither of these situations will the guilty plea be held to have been involuntary.

The instant case is the rare one—unique in this Circuit so far as we know—where after an evidentiary hearing the district court has made a finding based on substantial evidence that the state prisoner has sustained his burden of proving that the circumstances as they existed at the time of the guilty plea, *judged by objective standards, United States ex rel. Curtis* v. *Zelker, supra*, 466 F.2d at 1098, reasonably justified his mistaken impression—here, a false statement by defense counsel to Mosher that a promise of a minimum sentence had been made by the judge who thereafter imposed the maximum sentence.

We also agree with the district court's alternative holding that under the particular circumstances of this case Mosher's guilty plea must be vacated because he was denied the effective assistance of counsel. Cf. *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42-43 (2 Cir. 1972), *cert. denied*, 410 U.S. 917 (1973), and authorities there cited. And we hold that the district court did not abuse its discretion, following by analogy *Santobello* v. *New York, supra*, 404 U.S. at 263, in fashioning relief here so as to grant to the state courts the option of requiring that Mosher be given the sentence he thought he had bargained for, or permitting him to withdraw his guilty plea and to stand trial on the indictment.

Finally, we note that this case provides a striking example of the desirability of opening up the plea bargaining

procedure, as recommended by the ABA Standards Relating To Pleas Of Guilty (Approved Draft, 1968) and the ALI Model Code Of Pre-Arraignment Procedure, Tent. Draft No. 5, Art. 350 (April 1972).

Affirmed.